

## Internal Revenue Service

Department of the Treasury

Washington, DC 20224

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Third Party Communication: None

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Person To Contact:

ID No.

Telephone Number:

Refer Reply To:

CC:PSI:B04

PLR-101842-19

Date:

August 12, 2019

### LEGEND

Decedent =

Spouse =

Accountant =

Attorney =

Date 1 =

Date 2 =

Year 1 =

Year 2 =

Amount 1 =

Amount 2 =

Dear :

This letter responds to the letter from your authorized representative dated January 31, 2019, requesting an extension of time pursuant to § 301.9100-3 of the Procedure and Administration Regulations to make an election under § 2010(c)(5)(A) of the Internal Revenue Code to allow Decedent's surviving spouse (Spouse) to take into account the deceased spousal unused exclusion (DSUE) amount.

The information submitted for consideration is summarized below.

Decedent and Spouse were married on Date 1, and remained married until Decedent's death on Date 2. At the time of death, Decedent had assets with a value of Amount 1 and Spouse had assets with a total value of Amount 2. In the year of Decedent's death, the estate tax basic exclusion amount exceeded the value of Decedent's estate and Decedent made no lifetime gifts. As Spouse was the sole heir of Decedent's estate, none of Decedent's exclusion amount was used due to the full marital deduction.

Spouse was appointed executor of Decedent's estate and engaged a licensed certified public accountant (Accountant), who was experienced in estate and fiduciary income tax matters. Accountant had provided tax advice and prepared income tax returns for Decedent and Spouse from Year 1 until Decedent's death. The purpose of engaging Accountant was to "advise [Spouse] regarding the Estate's tax obligations and elections available to the Estate and the Taxpayer."

Spouse submitted Decedent's financial information to Accountant. Accountant was aware that the estate could elect to transfer the DSUE amount to Spouse; however, Accountant neither advised Spouse of the availability of such an election nor prepared Form 706, *United States Estate (and Generation-Skipping Transfer Tax) Return* so that a portability election could be made.

Spouse had no knowledge of the availability of an election regarding portability of a DSUE amount until Year 2 when the son of Decedent and Spouse became aware of the election and asked if it had been made after Decedent's death. After hearing of the possibility of a portability election, Spouse sought the counsel of an attorney (Attorney) to determine if the election was applicable to Decedent's estate. After discussion with Attorney, Spouse concluded that proper advice regarding electing portability of the Decedent's DSUE amount had not been given and retained counsel to assist with a request for an extension of time to elect portability of Decedent's unused exclusion.

## LAW AND ANALYSIS

Section 2001(a) imposes a tax on the transfer of the taxable estate of every decedent who is a citizen or resident of the United States.

Section 2010(a) provides that a credit of the applicable credit amount shall be allowed to the estate of every decedent against the tax imposed by § 2001.

Section 2010(c)(1) provides that the applicable credit amount is the amount of the tentative tax that would be determined under § 2001(c) if the amount with respect to which such tentative tax is to be computed were equal to the applicable exclusion amount.

On December 17, 2010, Congress amended § 2010(c), effective for estates of decedents dying and gifts made after December 31, 2010, to allow portability of a decedent's unused applicable exclusion amount between spouses. Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, § 303, 124 Stat. 3296, 3302 (2010).

Section 2010(c)(2) provides that the applicable exclusion amount is the sum of the basic exclusion amount and, in the case of a surviving spouse, the DSUE amount.

Section 2010(c)(3) provides that the basic exclusion amount, is which to be adjusted for inflation annually after calendar year 2011.

Section 2010(c)(4) defines the DSUE amount to mean the lesser of (A) the basic exclusion amount, or (B) the excess of -- (i) the applicable exclusion amount of the last deceased spouse of the surviving spouse, over (ii) the amount with respect to which the tentative tax is determined under § 2001(b)(1) on the estate of such deceased spouse.

Section 2010(c)(5)(A) provides that a DSUE amount may not be taken in to account by a surviving spouse under § 2010(c)(2) unless the executor of a decedent's estate files an estate tax return on which the DSUE amount is computed and elects that the DSUE amount may be taken into account. The election, once made, is irrevocable. No election may be made if such return is filed after the time prescribed by law (including extensions) for filing such return.

Section 2010(c)(6) provides that the Secretary shall prescribe regulations as may be necessary or appropriate to implement § 2010(c).

Section 20.2010-2(a) of the Estate Tax Regulations provides that to allow a decedent's surviving spouse to take into account that decedent's DSUE amount, the executor of the decedent's estate must elect portability of the DSUE amount on a timely filed Form 706.

Under § 20.2010-2(a)(1), the due date of an estate tax return required to elect portability is nine months after the decedent's date of death or the last day of the period covered by an extension (if an extension of time for filing has been granted). Section 20.2010-2(a)(1) further provides that an extension of time to elect portability may be available, under the procedures applicable under §§ 301.9100-1 and 301.9100-3, for estates not required to file an estate tax return under § 6018(a).

Section 20.2010-2(a)(2) provides that the portability election is made by timely filing a complete and properly prepared estate tax return, unless the executor satisfies the requirements for the election not to apply in § 20.2010-2(a)(3)(i).

Section 301.9100-1(c) provides that the Commissioner may grant a reasonable extension of time under the rules set forth in §§ 301.9100-2 and 301.9100-3 to make a regulatory election, or a statutory election (but no more than six months except in the case of a taxpayer who is abroad), under all subtitles of the Code, except subtitles E, G, H, and I.

Section 301.9100-3 provides the standards the Commissioner will use to determine whether to grant an extension of time to make an election whose due date is prescribed by a regulation (and not expressly provided by statute). Requests for relief under §301.9100-3 will be granted when the taxpayer provides evidence to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and that granting relief will not prejudice the interests of the government.

Section 301.9100-3(b)(1)(iii) provides that a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer failed to make the election because, after exercising reasonable diligence (taking into account the taxpayer's experience and the complexity of the return or issue), the taxpayer was unaware of the necessity for the election.

Section 6018(a) requires the filing of an estate tax return in all cases where the gross estate exceeds the basic exclusion amount in effect under § 2010(c) for the calendar year which includes the date of death. For purposes of this determination, under § 6018(a)(3), the basic exclusion amount is reduced, but not below zero, by the sum of (A) the amount of adjusted taxable gifts (within the meaning of § 2001(b)) made by the Decedent after December 31, 1976, plus (B) the aggregate amount allowed as a specific exemption under § 2521 (as in effect before its repeal by the Tax Reform Act of 1976) with respect to gifts made by the Decedent after September 8, 1976.

In this case, based on the representation as to the value of the gross estate, the time for filing the portability election is fixed by the regulations. Therefore, the Commissioner has discretionary authority under § 301.9100-3 to grant an extension of time for Decedent's estate to elect portability.

Based on the facts submitted and the representations made, we conclude the requirements of § 301.9100-3 have been satisfied. Accordingly, we grant an extension of time of 120 days from the date of this letter in which to elect portability under § 2010(c)(5). The election should be made by filing a complete and properly prepared Form 706 and a copy of this letter, within 120 days from the date of this letter, at the Kansas City Service Center, at the following address: Department of the Treasury, Internal Revenue Center, Kansas City, MO 64999. For purposes of electing portability, a

Form 706 filed by Decedent's estate with 120 days of this letter will be considered timely filed.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

If it is later determined that, based on the value of the gross estate and taking into account any taxable gifts, the Decedent's estate is required to file an estate tax return pursuant to § 6018(a), the Commissioner is without authority under § 301.9100-3 to grant an extension of time to elect portability and the grant of the extension referred to in this letter is deemed null and void. See § 20.2010-2(a)(1).

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

Sincerely,

Holly Porter  
Associate Chief Counsel  
(Passthroughs & Special Industries)

By: Melissa Liquerian  
Melissa Liquerian  
Chief, Branch 4  
Office of Associate Chief Counsel  
(Passthroughs & Special Industries)

Enclosures (2)

Copy of this letter  
Copy for section 6110 purposes

cc: